



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
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FCC Mail Room

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: PETITION FOR CLARIFICATION OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
WC Docket Nos. 11-42, 09-197, 10-90

DOCKET FILE COPY ORIGINAL

Dear Secretary Dortch:

Enclosed with this transmittal letter is the Replies to the Opposition of the National Cable & Telecommunications Association and the United States Telecom Association regarding the Petition for Clarification of the Pennsylvania Public Utility Commission that was filed on June 23, 2016. This concerns matters of the Federal Communications Commission's *Lifeline and Link Up Reform and Modernization, Third Report and Order*, released on April 27, 2016.

The Reply requests that the Federal Communications Commission (FCC) grant the Petition of the Pa. PUC and clarify: (1) the role of states in enforcement and consumer protection as it pertains to Lifeline Broadband Providers (LBPs); and (2) notice and registration requirements once providers have been granted federal designation as LBPs. While the Reply does not discuss outstanding compliance plans that were filed with the FCC pursuant to the 2012 Lifeline and Link Up Reform and Modernization Order because that particular request for clarification was not opposed, the Pa. PUC does seek clarity on how to treat these pending voice-only ETC applications.

Sincerely,

Colin W. Scott
Assistant Counsel

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**Before the
Federal Communications Commission
Washington, D.C., 20544**

Received & Inspected

AUG 12 2016

FCC Mail Room

In the Matter of)	
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42
)	
Telecommunications Carriers Eligible for Universal Service Support)	WC Docket No. 09-197
)	
Connect America Fund)	WC Docket No. 10-90

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
REPLIES TO THE OPPOSITION OF THE NATIONAL CABLE & TELECOMMUNICATIONS
ASSOCIATION AND THE UNITED STATES TELECOM ASSOCIATION**

The Pennsylvania Public Utility Commission (Pa. PUC) respectfully replies to two oppositions filed in response to its Petition for Clarification (Petition filed on June 23, 2016). The Pa. PUC petition sought clarity on: (1) the role of state commissions regarding enforcement and consumer protection following the release of the *Lifeline and Link Up Reform and Modernization, Third Report and Order* (2016 Lifeline Order), released on April 27, 2016; (2) notice and registration requirements for federally-designated Lifeline Broadband Providers (LBPs); and (3) outstanding compliance plans previously submitted to the Federal Communications Commission (FCC or Commission) for voice-only eligible telecommunications carriers (ETCs) in accordance with the Commission's 2012 Lifeline and Link Up Order that became effective on April 2, 2012.

The National Cable & Telecommunications Association (NCTA) contends that the Pa. PUC Petition seeks to have the FCC grant states authority to impose operational requirements on federally-designated LBPs to the detriment of the Commission's goals to streamline the method and requirements for LBP ETCs to join the federal Lifeline program. *NCTA Opposition* at p. 1. NCTA claims that the Pa. PUC's request for notice and registration by LBP ETCs with the appropriate state

commission will undermine the benefits of a single, federal process on which LBPs can rely. *Id.* In the second opposition, the United States Telecom Association (USTA) similarly argues against the notice and registration requirement requested by the Pa. PUC. *USTelecom Opposition* at p. 1.

USTA objects to the Petition because it seeks a determination that state commissions retain authority to enforce federal and state law pursuant to 47 U.S.C. § 214(e) and continue to engage in ordinary enforcement activities and consumer protections even when the ETCs involved are federally-designated LBPs. *Id.* Both NCTA and USTelecom claim that the FCC has preempted state authority over LBP ETCs. *NCTA Opposition* at pp. 3-4; *USTelecom Opposition* at pp. 2-4.

Reply to Opposition

As an initial matter, the Pa. PUC Petition for Clarification recognizes that the Commission may want the states to have no role in ordinary enforcement or consumer protection activities for FCC-designated LBPs that provide Broadband Internet Access Service (BIAS). However, precedent holds that the states have the constitutional authority and duty to apply federal statutes and determine statutorily appropriate remedies, including enforcement decisions that may result in state-to-state variations. *Illinois Public Telecommunications v. FCC*, 752 F.3d 1018, 1024-1025 (D.C. 2014) rehearing denied 2014 U.S. App. Lexis 694 (August 12, 2014), cert denied 2015 U.S. Lexis 2047 (March 23, 2015). Moreover, the FCC's own prior practice envisions the states having primary jurisdiction over interstate matters after the FCC has set the rules and policies. *In re: Subscriber Carrier Selection Charges and Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, Docket No. 94-129 (May 3, 2000), para. 1 and 23-28 (*Slamming Reconsideration Order*).

The Pa. PUC asks the FCC to specify procedures for state commissions to address consumer issues that will arise under these rules within their borders or, alternatively, instruct the states on how to direct all future consumer issues to the FCC for disposition if no role for state commission is envisioned.

The Pa. PUC simply seeks clarification and guidance on the states' role in regulatory enforcement and consumer protections as they apply to LBPs designated by the Commission. The FCC should reject the claim that the Pa. PUC seeks to "dismantle key elements of the LBP framework," as claimed by USTA. *USTA Opposition* at p. 2.

Even if the states are preempted, the states have an ongoing constitutional obligation to enforce federal law which, in this case, involves the matters raised by the Pa. PUC Petition. The FCC needs to clarify the scope of the *2016 Lifeline Order* regarding who, and how, consumers' complaints about this interstate service are to be addressed.

The fact that BIAS is an interstate service is not dispositive. It is no violation of federal law for the Commission to rely on states in part to implement federal law using the cooperative federalism reflected in the Telecommunications Act of 1996. *Illinois Public Telecommunications*, 752 F.3d at 1025. The FCC used this approach with regard to slamming and subscriber carrier selection changes. *Slamming Reconsideration Order* ¶¶ 1 and 23-28. There, the fact that the FCC set federal rules or policies did not mean that the states had no role on consumer issues under primary jurisdiction. The *Slamming Reconsideration Order* expected the states to exercise primary jurisdiction to enforce federal rules except in those instances when the state refused to do so. The FCC would act when a state would not.

Finally, the Pa. PUC recognizes that the FCC's authority to create a new, federal ETC designation process that preempts state commissions' primary authority to designate ETCs with respect to broadband services has come under scrutiny in the United States Court of Appeals for the District of Columbia Circuit.¹ However, this Pa. PUC Petition does not challenge the Commission's jurisdiction to develop a designation process, but only seeks clarification on what that will mean for consumers.

¹ *State of Wisconsin, et al. v. FCC, et al.*, Docket No. 16-1219 (D.C. Cir. June 30, 2016); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, et al.*, Docket No. 16-1170 (D.C. Cir. June 3, 2016).

I. The FCC has not Preempted State Commissions from Ordinary Enforcement or Consumer Protection Activities

USTA argues that the Commission's *2016 Lifeline Order* is sufficiently clear that states lack jurisdiction over LBPs and that the FCC's decision to preempt state authority over LBPs is accompanied by thorough legal and policy analyses. *USTelecom Opposition* at p. 2. The NCTA advocates that the Commission should clarify that states are preempted from imposing additional requirements or from enforcing the requirements imposed by the FCC on LBP ETCs. *NCTA Opposition* at p. 4. These claims are an expansive interpretation of the 2016 Lifeline Order that, if accepted, would equate to field preemption for state commissions of BIAS in the federal Lifeline program.

The Pa. PUC does not read the Commission action as wholly preempting state commissions from regulating BIAS in the federal Lifeline program. Field preemption applies only where federal regulation is so comprehensive that it leaves no room for supplemental state regulation. *See Farina v. Nokia Inc.*, 625 F.3d. 97, 121 (3d. Cir. 2010). In this instance, the *2016 Lifeline Order* would have had to evidence its desire to preempt states from all BIAS in the federal Lifeline program. However, there is no such evidence. Rather, the FCC preserves states' authority to designated ETCs to receive federal Lifeline reimbursement for qualifying voice and/or broadband services, and merely adds to the structure an alternative for carriers to seek designation as LBPs through the FCC when they are stand-alone broadband providers. *2016 Lifeline Order* at ¶ 218.

Moreover, contrary to these claims, nothing in the *2016 Lifeline Order* suggests that the Commission intended its preemption of state commissions' authority to be interpreted as field preemption, including enforcement. The FCC limited its preemption by stating "we preempt states from exercising authority to *designate* Lifeline-only broadband ETCs for the purpose of receiving Lifeline reimbursement for providing BIAS to low-income consumers." *2016 Lifeline Order* at ¶ 232 (emphasis added). Thus, the FCC preempted only states' authority to designate a new classification of ETCs, which in no way constitutes field preemption. Even if it did, such a broad preemption seems to

contradict the FCC's own prior practice under cooperative federalism as well as precedent. *Illinois Public Telecommunications* and *Slamming Reconsideration Order*. The *2016 Lifeline Order* is silent on the role of state commissions as it pertains to their authority to enforce federal rules and policies or state law pursuant to 47 U.S.C § 214(e) and to engage in ordinary enforcement activities and consumer protections when the ETCs involved are federally-designated LBPs, consistent with the states' constitutional obligation to enforce federal law. *Illinois Public Telecommunications*.

The proper interpretation of the Commission's preemption of state commissions' authority is conflict preemption, not field preemption. As previously stated, the Commission's analysis did not restrict or address the jurisdiction of the states as it pertained to enforcement or consumer protection under federal law for BIAS or independent state law that in no way constitutes ETC designation under federal law. In *AT&T Corp. v. Core Communications*, the Third Circuit addressed a similar jurisdictional question relating to state enforcement of the federal intercarrier compensation regime in the *ISP Remand Order*. 806 F.3d 715, 726 (3d. Cir. 2015). The Third Circuit recognized the FCC's power to regulate certain traffic between competitive local exchange carriers (CLECs), but stated the FCC had not exercised that jurisdiction or preempted state regulation outside of states' abilities to set rates above the federal rate cap. *Id.* at 727-728. Unless state regulation conflicted with the federal mandate, states were free to regulate and to enforce federal law. Here, the Pa. PUC recognizes that the Commission has authority to possibly preempt states from ordinary enforcement and consumer protection activities pertaining to LBPs. But, the Pa. PUC disagrees with the conclusion of USTA and the NCTA that the FCC has done so in this *2016 Lifeline Order*. As stated in the Pa. PUC Petition and consistent with the FCC's *Slamming Reconsideration Order*, states like Pennsylvania are well-equipped with the resources and expertise to handle compliance, enforcement, and consumer protection issues for interstate BIAS notwithstanding any limited preemption of ETC designation for stand-alone BIAS providers. The NCTA claim that a role for states in these enforcement capacities somehow undermines

the time and resources that the Commission has devoted to its Consumer Help Center is misguided and contradictory. If anything, an interpretation that the *2016 Broadband Order* requires every consumer in the nation with any BIAS issue to now contact the FCC or file a complaint at the FCC is what could undermine the FCC's goals of promoting BIAS availability and affordability. The Pa. PUC believes that clarification is needed to avoid inadvertently creating an untenable result or a dichotomy where enforcement activities against ETCs in the federal Lifeline program are administered exclusively by the FCC as opposed to utilizing the cooperative federalism envisioned in the *Slamming Reconsideration Order*. As the Pa. PUC commented in its Petition, there is a need for clarity to avoid ambiguity or confusion for state consumers.

Ironically, the jurisdictional uncertainty raised by the oppositions to the Pa. PUC Petition is the exact reason that the Pa. PUC requests clarification. A lack of clarity regarding the states' role will lead to unnecessary litigation at the state and federal level. For the foregoing reasons, the Pa. PUC recommends that the Commission grant the Petition, allow states ordinary enforcement and consumer protection authority, and provide further guidance to state commissions, the industry, and to consumers.

II. The Commission Should Require Notice and Registration to Appropriate State Commissions

The NCTA contends that the Pa. PUC's request to have Lifeline Broadband Providers give notice to the appropriate state commission when they begin operating in a state eliminates the benefits cited by the Commission in preempting states from designating LBPs. *NCTA Opposition* at p. 3. However, the reasons the FCC cites, such as existing ETC designation processes varying widely between states or being unnecessarily burdensome, would not be affected by requiring LBPs to notify appropriate state commissions once they have received their federal designation and have begun operating. Rather, entry into the competitive marketplace should already be complete. The Pa. PUC is not advocating for placing excess operational requirements on LBPs in order for such providers to

receive or maintain their ETC designations. Instead, the Pa. PUC is requesting that after LBPs have received their designations, state commissions be kept informed with a notice and filing requirement of what BIAS providers are operating in their state in order to interact effectively with their consumers.

The FCC's recent numbering decision for VoIP providers is an illustrative example of a workable notice and registration process. *See In the Matter of Numbering Policies for Modern Communications*, 28 F.C.C. Rcd. 5842, 5878, ¶ 88, 105-108 (2013). There, the FCC established a national number availability process which included notice and information for the states. That is equally appropriate here.

The NCTA further argues that notice or registration with appropriate state commissions runs inherently counter to the Commission's goals of eliminating multiple, different state requirements and procedures. *NCTA Opposition* at p. 1. The Pa. PUC disagrees. While the FCC could certainly allow each state to devise its own notification or registration requirements, the Pa. PUC Petition only recommends that the FCC should specify how the states should know who the service providers are and how they may be reached by the states or consumers with specific service issues. *Pa. PUC Petition* at pp. 10-11. Therefore, the Commission could readily prescribe a uniform, streamlined manner for a LBP to notify or register with appropriate state commissions once it receives its federal ETC designation. Thus, LBPs could potentially rely on the benefits of a single, federal process for notification and registration, precisely in step with the goals the 2016 Lifeline Order outlined.

Whether the FCC chooses a uniform federal process that all LBPs use to notify relevant state commissions of their operational status or allow states the flexibility to craft their own notification requirements, the Pa. PUC remains steadfast in its recommendation that the Commission require federally-designated ETCs to alert appropriate state agencies of their presence in the relevant states. Irrespective of the creation of the new federal LBP designation or some burden claimed by USTA and NCTA, state commissions will undoubtedly continue to receive consumer inquiries and complaints

regarding ETC services offered by LBPs. At the very least, state agencies should be able to inform consumers that they are aware of these ETCs, are able to contact them, and are able to forward concerns to the Commission.

USTA argues that the Pa. PUC's requested notice and registration requirements equate to implicit regulatory oversight. *USTelecom Opposition* at p. 4. This interpretation improperly commingles the Pa. PUC's interest in enforcement and consumer protection with its interest in being aware of providers conducting business in Pennsylvania. If the Commission entrusts state commissions with ordinary enforcement and consumer protection activities for the interstate rules established for this interstate service, as occurred in the *Slamming Reconsideration Order*, LBPs will need to notify and register with appropriate state commissions in order for the commissions to fulfill their obligations. If, however, the FCC opts to handle enforcement and protection activities separately, that does not remove the states' interest in knowing that a provider is conducting business there. State commissions often will be the first place that consumers contact when quality of service disputes or issues arise for example. Consequently, state commissions must be able to forward such correspondence either to a LBP, which will require a contact point with the respective provider, or to the FCC for subsequent action.

As the Pa. PUC Petition references, the Commission presently requires Voice over Internet Protocol (VoIP) providers that seek direct access to numbering resources to comply with FCC number utilization and optimization requirements as well as industry guidelines and practices, including providing advance notice of numbering requests to states. *See In the Matter of Numbering Policies for Modern Communications*. State commissions do not regulate these providers; however, the FCC still requires them to provide notice and regulatory contacts to states. Therefore, it is entirely consistent for the Commission to require LBP ETCs to provide similar notice to state commissions before they begin operating. Despite USTA's contentions as to the necessity of notice and registration, the Pa. PUC's

request is neither new nor novel. This has been used in the past, is being used in the VoIP numbering process, and can be used for BIAS consumers here.

Finally, USTA incorrectly proffers that the notice and registration requirements proposed by the Pa. PUC are unnecessary because it is likely that providers seeking LBP ETC designations are already operating in areas within the states for which they would seek federal designation. While it may be true that several potential LBPs are currently operating in states as ETCs pursuant to valid state designations, a key purpose of Lifeline reform and of creating the LBP designation was to streamline the ETC designation process to allow more providers to participate in the federal Lifeline program. 2016 FCC Order at ¶¶ 235-236. According to the 2016 FCC Order, requiring providers to obtain ETC designation on a state-by-state basis was burdensome to the point of being preventive; providers were unwilling to become Lifeline ETCs and some relinquished their designations entirely. *Id.*

Against this backdrop, it is reasonable to believe that the federal designation process will:

(1) lead several new LBP ETCs that are not currently known to state commissions to enter the Lifeline market and begin providing service; and (2) cause several state-designated ETCs to either relinquish those designations in favor of the federal designation or to allow their state designations to lapse.

Without notice and registration, in this latter scenario state commissions will have no way to know whether ETCs have abandoned service altogether or simply sought a federal designation. With notice and registration, the Pa. PUC wants to know what LBPs are providing BIAS within the Commonwealth so that when the inevitable consumer matters arise, the Pa. PUC can either address them as permitted by the FCC or, alternatively, send these matters to the FCC.

For these reasons, the Pa. PUC urges the Commission to require LBP ETCs to provide notice and/or register with appropriate state commissions before beginning to provide federal Lifeline service.

Conclusion

The Commission's *2016 Lifeline Order* preempted state commissions only insofar as their authority to designate newly classified Lifeline Broadband Provider ETCs. This does not amount to field preemption forbidding the state commissions from regulating all BIAS pertaining to the federal Lifeline program; at this time the FCC has not restricted states' abilities to enforce, or otherwise address, federal law. Therefore, as long as state commissions' actions do not conflict with the mandates of the *2016 Lifeline Order*, states remain well-positioned and competent to regulated LBP ETCs. The Commission should explicitly clarify the role of the state commissions and provide guidelines to avoid burdensome and costly litigation at the state and federal level. The FCC should require LBPs to provide notice and to register to the states to keep them aware of the entities providing LBPs in their borders.

The Pa. PUC thanks the Commission for providing an opportunity to respond and asks the Commission to reject the Opposition Filings and grant the Pa. PUC Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Colin W. Scott, hereby certify that on this 8th day of August 2016, true and correct copies of the foregoing document, Reply to Opposition, were served upon the parties listed and in the manner indicated below.

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